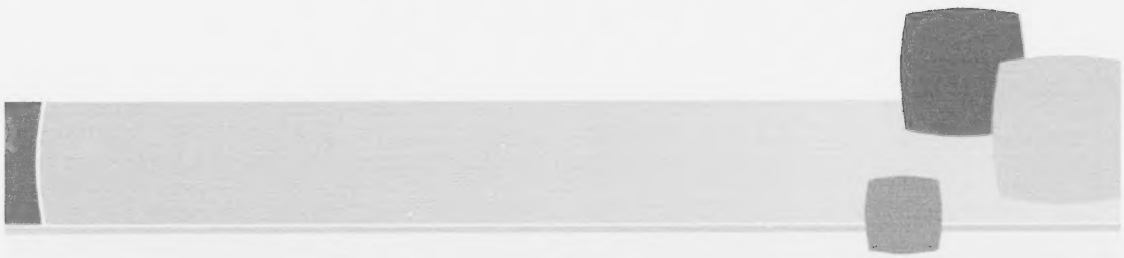
Competition Bureau Canada | Bureau de la concurrence Canada

INFORMATION BULLETIN

SECTION 15 & 16 OF THE *COMPETITION ACT*

April 25, 2008



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Preface

The Competition Bureau (the "Bureau") is an independent law enforcement agency which contributes to the prosperity of Canadians by protecting and promoting competitive markets and enabling informed consumer choice. The Bureau investigates anti-competitive practices and promotes compliance with the laws under its jurisdiction; namely the *Competition Act*, the *Consumer Packaging and Labelling Act*, the *Textile Labelling Act*, and the *Precious Metals Marking Act*.

The Bureau endeavours to be as transparent as possible in providing information to Canadians on the application of the laws under its jurisdiction. One of the ways to do so is to issue Bulletins, which are policy statements published to provide clarity to the Bureau's approach on a variety of its enforcement tools, policies, and procedures. This Bulletin reflects the practices and policies of the Bureau as they pertain to sections 15 and 16 of the *Competition Act* (the "Act") and is not a substitute for professional legal advice. This Bulletin is not designed to provide information on all the investigative processes or eventualities in the execution of a search warrant but is intended to be a general approach to how the Bureau uses its section 15 and 16 powers and to inform the business and legal community of the search procedures of the Bureau.

The Bureau is committed to the effective use of sections 15 and 16. Search warrants are important investigative tools used to obtain the information necessary to make a fully informed decision on the disposition of a matter. A strong and reasoned approach tot he use of section 15 and 16 is important to the integrity of the information gathering process in the effective administration and enforcement of the Act.

Sheridan Scott
Commissioner of Competition

A. Introduction

The purpose of the Act is to maintain and encourage competition in Canada. It is commonly referred to as a law of general application, and with limited exceptions, applies to all persons, including businesses, in Canada. The Act contains provisions dealing with criminal offences and civil matters (including mergers). Criminal activities are subject to prosecution through the criminal courts, while civil matters are reviewable by the Competition Tribunal.

To effectively administer and enforce the Act, the Commissioner of Competition[1] (the "Commissioner") requires accurate and complete information. This information comes from a variety of sources, including complainants, industry participants (such as competitors, suppliers or customers), industry experts, and Canadian or foreign law enforcement agencies.

How the Commissioner comes into the possession or control of information varies greatly. Some information, such as voluntary production, can be obtained without having to resort to a formal process. In other situations, however, the information may not be so readily available. For example, the targets of an investigation may be sophisticated firms or individuals operating in a covert or fraudulent fashion. Rapidly advancing technology may also act as a vehicle permitting users to communicate with others to implement possible anti-competitive conduct. Moreover, this technology can assist in the perpetration of anti-competitive conduct, as well as act as a storage device to house information relating to anti-competitive activity.

The Commissioner, where circumstances warrant, has access to search and seizure powers to obtain all necessary information in order to make a fully informed decision as to the appropriate disposition of a matter. As such, during the course of an investigation, whether civil or criminal, the Commissioner may apply to the courts for a search warrant[2] under section 15 of the Act to facilitate the gathering of information.[3] Section 16 is an important adjunct to section

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[1] The term "Commissioner" encompasses all authorized Bureau employees and agents. The terms "Commissioner", "Bureau" and "Bureau staff" are used interchangeably in this Bulletin.

[2] Reference to "search warrants" in this document are those warrants issued pursuant to section 15 of the Act.

[3] In certain circumstances, the Commissioner may also make use of *Criminal Code* search warrants (section 487) for criminal investigations under the Act. *Criminal Code* search warrants are also required for investigations by the Commissioner under the *Consumer Packaging and Labelling Act*, the *Textile Labelling Act* and the *Precious Metals Marking Act*. These types of investigations do not fall under the purview of the Act and, as such, section 15 search warrants are not available.

15 as it sets out the Commissioner's powers to search computer systems.

This Bulletin will provide an overview of sections 15 and 16 of the Act, and their application.[4] As this Bulletin avoids legal language wherever possible, there may be some generalizations about the application of the Act. Certain provisions of the Act are subject to important exceptions or qualifications. The Commissioner will consider each specific factual situation on its own merits and will use flexibility when determining how sections 15 and 16 will be used in practice.

B. Overview of Section 15

Section 15 of the Act outlines the Commissioner's powers of search and seizure. Search warrants issued under section 15 allow the Commissioner to gather relevant information, inculpatory and exculpatory, pertaining to an investigation in relation to either a criminal or civil matter in Canada. More specifically, section 15 provides that the Commissioner may apply to a judge of a superior or county court, *ex parte*[5], for a search warrant, authorizing the Commissioner or any person named in the search warrant to conduct a search of the identified premises and to copy or seize certain records[6] or other things[7] for examination or copying.

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[4] The Commissioner also has other tools available to obtain information, including section 11 orders which provide for the gathering of information through the use of court orders compelling a person to be examined under oath, to produce records specified in the order, or to make and deliver a written return of information. For more information on section 11 orders, please refer to the *Information Bulletin on Section 11 of the Competition Act* (Ottawa, Industry Canada, 2005) found on the Bureau's website at www.competitionbureau.gc.ca . As well, the Commissioner can use wiretaps to gather information. Under section 183 of the *Criminal Code*, the Commissioner can seek authorization to intercept a private communication to investigate the following offences under the Act:(1) conspiracy in relation to any matters referred to in paragraphs 45(4)(a) to (d); (2) bid-rigging (s. 47); and (3) deceptive telemarketing (s.52.1(3)). For more information on the interception of private communications, please refer to the *Information Bulletin - Interception of Private Communications and the Competition Act* (Ottawa, Industry Canada, 1999) found on the Bureau's website at www.competitionbureau.gc.ca . It is important to note that, in determining which tool to use, the Commissioner will consider whether less intrusive means to obtain such information are appropriate.

[5] A proceeding where neither the person subject to an order, nor the person subject to the investigation is present at the proceeding or notified beforehand. The term "*ex parte*" is further elaborated upon in the document.

[6] The term "record" is defined in section 2 of the Act.

[7] Throughout this Bulletin, the term "record" will also encompass "other things".

A judge, to whom the application for a search warrant has been presented, will determine whether the information submitted justifies the issuance of a search warrant. If satisfied, a judge may issue a search warrant authorizing the Commissioner to enter and search the premises, and to copy or seize any record described therein, for examination or copying. The information obtained pursuant to a search warrant may assist the Commissioner in making a decision whether to apply to the Competition Tribunal, refer the matter to the Director of Public Prosecution("DPP")[8] or discontinue an investigation or inquiry, as the case may be.

The full text of section 15 may be found at Appendix A.

C. Overview of Section 16

Section 16 of the Act provides that a person authorized to search premises pursuant to subsection 15(1), may use or cause to be used any computer system on the premises to search any data contained in or available to the computer system, in order to search for records described in the search warrant. The records may be reproduced or they may be caused to be reproduced from the data in the form of a printout or other intelligible output. The printout or other output may be seized for examination or copying.

The terms "computer system" and "data" are defined in the *Criminal Code* [subsection 342.1(2)], and are made applicable by subsection 16(6). Based on that definition, any computer system can be searched for the records set out in the search warrant. In addition, data that are accessible via the computer system can be searched even if the data are not located on the premises.

The full text of section 16 may be found at Appendix A.

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[8] On December 12, 2006, the Office of the Director of Public Prosecutions was created as part of the *Federal Accountability Act*. This Act gives the Director of Public Prosecutions jurisdiction to conduct prosecutions for offences under federal jurisdiction. This office is independent of the Department of Justice and takes over the duties of the former Federal Prosecution Service (FPS).

D. Other Relevant Provisions of the *Competition Act*

The following provisions contain relevant information relating to sections 15 and 16 of the Act[9]:

- section 2: provides the definition of a record;
- section 17: relates to the making of a report to a judge subsequent to the seizure of records or other things, and for the application of a retention order;
- section 18: deals with the care of and access to seized records, the Commissioner's authority to make copies, retention orders and the rules for the return of the records;
- section 19: deals with claims of solicitor-client privilege;
- section 20: subsection 20(1) provides the Commissioner the right to inspect the records and other things; subsection 20(2) makes certified true copies admissible as evidence;
- section 29: deals with confidentiality;
- sections 64 and 65: relate to penalties for obstructing an inquiry or examination and failing to comply with an order under subsections 15(5) and 16(2), and the removal or destruction of records and other things; and
- section 69: relates to the use of records as *prima facie* evidence[10] in court.

E. Obtaining a Search Warrant under Section 15

1) Authorization and Requirements

Before granting a search warrant under section 15 of the Act, a judge of a superior or county court[11] must be satisfied that there are reasonable grounds to believe.[12]

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[9] Some of these provisions are further elaborated upon in this Bulletin.

[10] *Prima facie* evidence is evidence that is strong enough at face value to establish a fact unless the evidence is successfully contested.

[11] A superior court includes the Federal Court.

[12] The information relied on by the affiant as grounds for belief in the Information to Obtain, which is part of the application fora search warrant, comes from a variety of sources including but not limited to victims, customers, current and former employees and competitors of the target of an investigation. The reasonable grounds section sets out the highlights of the case and set forth the general framework of the case and will establish the context for the evidence sought in the warrant.

- that a person has contravened any order made pursuant to the Act, an offence has been or is about to be committed, or grounds exist for the making of an order under the civil provisions of the Act; and
- that there are, on the specific premises to be searched, records that will afford evidence relating to one of the three above specified situations.

Section 15 also provides for certain requirements. More specifically, the provision sets out requirements regarding the content of the search warrant and the manner in which the search warrant will be executed (e.g. who can participate, time and location of execution, access to premises refused and warrantless searches).

2) Ex parte Application

In keeping with subsection 15(1), the Commissioner will apply to the court *ex parte* for a search warrant which means that neither the person subject to the search warrant nor the person subject to the investigation is notified beforehand. This ensures that the information is found on the premises as is, and that records are not destroyed, removed or altered prior to the execution of the search warrant.

3) Venue of Application

Pursuant to subsection 15(1), search warrant applications will be made before a judge of a superior or county court. For investigations of alleged offences under the Act, the Bureau will likely bring an application for a search warrant before the provincial superior court where it is anticipated that the indictment, if any, will be filed. In civil matters, an application for a search warrant would normally be brought before the Federal Court. In the case of multiple province searches, the application for a search warrant will likely be brought where it is anticipated that the indictment, if any, will be filed. In all cases, the Commissioner retains the discretion to determine which is the most appropriate jurisdiction/forum.

4) Warrantless Searches

Pursuant to subsections 15(7) and 15(8) of the Act, the Bureau may perform a warrantless search if there are exigent circumstances that would make it impracticable to obtain a search warrant under section 15. Exigent circumstances would include a risk that relevant records could be lost or destroyed.

F. When the Commissioner will Seek a Section 15 Search Warrant

For certain investigations, a search warrant will be the investigative tool of choice. In fact, searches are one of the Bureau's most effective investigative tools to combat cartels and mass marketing fraud as the element of surprise provided by the execution of a search warrant is deemed essential to obtaining the required information.[13] In some cases, the serious and clandestine nature of the conduct in question, and the possibility that records could be altered, concealed or removed can make searching the best means of securing the required information. In addition, a search warrant allows the Commissioner to establish exactly where the records are located on a premises and who may have been in possession of them. The Commissioner's decision to seek a search warrant is assessed on a case-by-case basis with the specific fact situation of each case being examined on its own merits.

G. Executing Section 15 Search Warrants

The purpose of this section is to provide a brief overview of some of the issues that may arise during the execution of a search warrant by the Commissioner. It is important to note that this section does not purport to address all eventualities and investigative processes nor is it to be viewed as a step-by-step guide to the execution of a search warrant carried out by the Commissioner.

1) Prior to the Execution of a Search Warrant: Sealing of the Application

The Supreme Court of Canada[14] has clearly accepted and endorsed the principle that, once a warrant is executed and records are seized, the occupier of the premises searched and the public can have access to the related judicial documents. However, when applying for a search warrant, the Commissioner will seek a sealing order[15] where there are sufficient grounds to believe that

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[13] A search warrant could also be sought by the Commissioner in reviewable matter cases. Examples of such cases are joint abuse cases where evidence of an agreement may be of relevance, an obstruction case or a dual track inquiry under the reviewable conduct provisions of Part VII.1 (Deceptive Marketing Practices) and section 52(1) of the Act.

[14] See for example, *R v. Toronto Star Newspapers, Canadian Broadcasting Corporation and Sun Media Corporation*, [2005] 2 S.C.R.188

[15] A sealing order will preclude the disclosure of the application in support of a search warrant for a specified time period.

disclosure would subvert the ends of justice or unduly impair its proper administration. These grounds could include what is specified in subsection 487.3 (2)*(a)* of the *Criminal Code*.[16] For example, if disclosure of the application were to compromise the identity of a confidential informant or compromise the nature and extent of an ongoing investigation, the Commissioner would seek a sealing order. Ultimately, the court will decide whether a sealing order will be granted or not. Taking into consideration the DPP's recommendation, the court will also determine the period of time applicable for the sealing order. A target may also apply to the court for a sealing order.

If the Information to Obtain (" ITO")[17] has not been sealed or is unsealed, it may be made available once the warrant has been executed or the court may decide that the ITO will not be made available until the Report to the Judge[18] has been filed. If the ITO remains sealed, the sealing order may specify that a redacted copy of the ITO may be provided by the DPP at their discretion upon receipt of a written request. Subject to a request by a target, in most cases the ITO is provided to the target with redactions intended to protect the identity of an informant. If the DPP refuses to provide the redacted copy of the ITO or the Applicant is not satisfied with the

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[16] 487.3 (1) A judge or justice may, on application made at the time of issuing a warrant under this or any other Act of Parliament or a production order under section 487.012 or 487.013, or of granting an authorization to enter a dwelling-house under section 529 or an authorization under section 529.4 or at any time thereafter, make an order prohibiting access to and the disclosure of any information relating to the warrant, production order or authorization on the ground that

(a) the ends of justice would be subverted by the disclosure for one of the reasons referred to is subsection (2) or the information might be used for an improper purpose; and

(b) the ground referred to in paragraph (a) outweighs in importance the access to the information.

(2) For the purposes of paragraph (1)(a), an order may be made under subsection (1) on the ground that the ends of justice would be subverted by the disclosure

(a) if disclosure of the information would

(i) compromise the identity of a confidential informant,

(ii) compromise the nature and extent of an ongoing investigation,

(iii) endanger a person engaged in particular intelligence-gathering techniques and thereby prejudice future investigations in which similar techniques would be used, or

(iv) prejudice the interests of an innocent person; and

(b) for any other sufficient reason.

[17] The Information to Obtain a Search Warrant is the principal document used to set out the grounds for the issuance of a search warrant. It describes the offence(s) alleged, the records or things to be searched for and the premises to be searched.

[18] Report to a Judge is elaborated upon later in the document ans also see section 17 of the Act.

redaction, the Applicant can bring an application to the court to have the sealing order set aside.

2) Search Team

Searches are conducted by Bureau staff. Depending on the circumstances, the presence of other persons, such as peace officers, may be required. Unless specifically authorized, the search team will not normally include employees from non-Canadian authorities or other foreign representatives. Typically, a minimum of two staff members execute a search warrant at a given premises. At times, a large number of Bureau staff and/or other persons may be present, although not all need be specifically named in the warrant. Some search members may be on the premises during the entire search, others may leave or new search team members may be added.

The composition of a search team will depend on a number of factors such as:

- the premises to be searched (e.g. size, location, type, number of people on the premises, etc.);
- the information being sought (e.g. complexity of the case, type of information, estimated volume of records, existence of electronic records, etc.);
- the anticipated/actual duration of the search; and
- the need for certain persons with particular skills, training or knowledge (e.g. electronic evidence officers, locksmiths, peace officers, persons with certain linguistic proficiencies, etc).

Every search team will include a "team leader". The team leader is the person responsible for the overall conduct of a search at any given search premises. Generally, the team leader will present the search warrant, explain search procedures with corporate representatives and counsel, and will manage and co-ordinate the search team. All questions regarding the conduct of the search should be directed to the team leader.

3) Premises

Pursuant to subsection 15(4) of the Act, a search warrant can be executed anywhere in Canada. That being said, searching certain premises may merit special attention. The Bureau will exercise particular care when searching sensitive premises such as a media establishment, a law office, or a private residence. The Commissioner will seek a separate search warrant for each premises unless several buildings or places are located at the same address, such as a house and its garage or outbuildings.

4) Time and Date of Execution

Pursuant to subsection 15(3) of the Act, a search warrant is to be executed between 6:00 a.m. and 9:00 p.m., unless the judge issuing the search warrant authorizes execution of it at another time. In general, a search is conducted during normal business hours. Searching, however, may occur beyond these hours. For example, the downloading of data may well have commenced during normal searching hours but to complete the download may require going beyond 9:00 p.m. With regard to the date of execution, the search warrant will be executed within the judicially authorized time frame specified in the warrant.

5) Entry, Identification and Presentation of a Search Warrant

On the day the search warrant is to be executed, the search team will arrive at the premises to be searched. The team leader, accompanied by the search team or a portion thereof, will enter the premises. Once inside the premises, the team leader will present the search warrant to the person in possession or control of the premises. Depending on the exigencies, an explanation of the search warrant will ensue and the team leader will typically advise the person to whom the search warrant is being presented that they may contact legal counsel. The team leader will outline how the search will unfold before beginning the search. A tour of the premises may be requested by the team leader and arrangements may be made to have a designated work area for the search team (e.g. a vacant office or a conference room). In certain circumstances, searching may occur immediately (i.e. once inside the premises), without taking the above-noted steps, where delay may cause the removal or destruction of records.

6) Securing the Premises and Commencing the Search

Pursuant to subsection 15(5), every person who is in possession or control of any premises or record shall, on presentation of the search warrant, permit the Commissioner or other person named in the warrant to enter the premises, search the premises and to examine the record and to copy it or seize it. Once inside the premises the search team will take reasonable steps directed toward securing the premises to ensure that records subject to search and seizure will not be concealed, removed or destroyed. For example, filing cabinets, shredders and third-party shredding company repositories may be sealed with tamper-proof seals until they have been searched. Access to computer systems, data storage devices or media may also be restricted. When steps are taken to secure the premises, where appropriate, every reasonable attempt will be made to ensure that these steps interfere as little as possible with the activities of the person being searched.

The Commissioner has the legal right to commence the search right away. Once the premises are adequately secured, the team leader may accommodate a request to delay a search for a reasonable period of time until the arrival of a senior corporate official and/or counsel. Any such request for a delay should be directed to the team leader. What is considered reasonable will depend on a number of factors such as whether the delay will interfere with the execution of the search warrant, whether there is urgency to execute the search warrant, the type of premises being searched, and the likelihood of records being removed or destroyed. Ultimately, it is the team leader who will make the final determination whether to delay a search.

7) Selection and Review of Paper Records[19]

Once the search has commenced, the search team will begin a preliminary selection of paper records. The paper records to be seized are described or referred to in the search warrant. Further review and culling of paper records is usually done by the team leader subsequent to the preliminary selection of paper records. This review may reveal that some records are not required. In such cases, these records will be returned to the location where they were selected.

8) Searching for Electronic Records

The Bureau has on staff trained electronic evidence officers. They have specialized knowledge and skills which allow them to access computer systems to search for, examine, retrieve, reproduce and seize electronic data. They adhere to accepted forensic practices and procedures designed to ensure the integrity of the evidentiary process for obtaining and maintaining electronic records, and the integrity of electronic media from which they are sourced, while attempting to minimize the impact on business functions.

Electronic evidence investigators may use the following practices and procedures as circumstances dictate:

- search the computer system, data storage device or media and produce an image to examine and extract relevant data off-site;

- search the computer system, data storage device or media and reproduce an electronic copy of relevant data on-site;

[19]Paper records in this section means paper records and other things as provide for under section 15(1)(d) of the Act.

- search the computer system, data storage device or media and print a copy of relevant data on-site; or

- seize the computer system, data storage device or media and remove it/them from the premises, to examine and extract relevant data off-site.

Pursuant to subsection 16(2) of the Act, persons named in the warrant may use or cause to be used any computer system or part thereof on the premises to search any data contained in or available to the computer system, no matter where those data are located. A record that the person is authorized to search for may be produced from the data to obtain a physical copy thereof and to seize it.

9) Videos and Photographs

The search team may videotape or photograph the search process (i.e. as a form of note-taking to record the lay-out and/or state of the premises). It can also be used as a means of gathering evidence. For example, it would be more practical to take a video or photograph of information found on a "white board" mounted on a wall rather than to seize the actual "white board".

10) Solicitor-Client Privilege

Records which are subject to claims of solicitor-client privilege may be found on the premises subject to a search warrant. Section 19 of the Act sets out detailed procedures for dealing with claims of solicitor-client privilege. More specifically, subsection 19(2) of the Act provides that where there is a claim of solicitor-client privilege regarding records that may be subject to examination pursuant to sections 15 or 16, the records in question must be placed in a package, sealed, identified, and placed in the custody of a person as provided in subsection 19(3) of the Act.[20] It is up to a judge, upon application, to decide whether the information is subject to solicitor-client privilege. However, issues of privilege have often been resolved without the need to resort to a formal court process. The Bureau is willing to minimize the need for such a formal,

[20] Persons authorized by subsection 19(3) of the Act are as follows: the registrar, protonotary or other like officer of a superior or county court in the province in which the record was ordered to be produced or in which it was found, or of the Federal Court; a sheriff of the district or county in which the record was ordered to be produced or in which it was found; or some person agreed on between the Commissioner, or the authorized representative of the Commissioner, and the person who makes the claim of privilege.

judicial process to screen privileged from non-privileged records on a case-by-case basis.

Typically, the team leader when outlining the search process, will discuss with corporate representatives and/or counsel the appropriate procedure for dealing with such claims. The team leader will attempt to set out mutually agreeable on-site procedures for handling solicitor-client privilege claims in keeping with section 19 of the Act and to discourage corporate representatives and/or counsel from making a blanket claim of privilege. Situations where a blanket claim of privilege is made will result in all such records being sealed and placed in the custody of a person as provided in subsection 19(3) of the Act. In keeping with subsection 19(7) of the Act, a reasonable opportunity will be afforded to make a claim of solicitor-client privilege. Where there is reason to believe that privileged records are located in certain areas of the premises to be searched, staff will avoid searching those areas without first providing counsel with the opportunity to review the records for solicitor-client privilege claims. In such situations, Bureau staff will oversee the review and ensure that control over the premises is maintained.

For electronic records, due to the volume of such records to be reviewed and the technical requirements for accessing and maintaining the integrity of the electronic records, the review of solicitor-client privilege for electronic records may take place following the seizure, further to a mutually agreeable process.

11) Talking to and Questioning Individuals

Bureau staff will speak to persons found on the premises in order to facilitate the search process. For example, queries may be made regarding the lay-out of the premises or the location of certain records. Likewise, persons may wish to approach Bureau staff and voluntarily provide evidence. The Bureau may also wish to question individuals for the purpose of gathering evidence. In situations where the individual is considered a target of an inquiry, that person will be cautioned to ensure the person is aware of his/her rights, which includes the right not to answer any questions, and that any information he/she provides can be used as evidence. Bureau staff do not have the power to arrest or detain individuals and will make this known to any potential interviewee.

In addition, it is important to note that under the whistleblowing provisions of the Act, sections 66.1 and 66.2, anyone who has reasonable grounds to believe that an offence has been or may be committed under the Act may notify the Bureau of the particulars and may request that his or her identity be kept confidential. The Commissioner shall keep confidential the identity of a person who has made such disclosure and to whom an assurance of confidentiality has been

provided.

The Bureau also has in place an Immunity Program whereby a party (which includes an individual) implicated in criminal anti-competitive activity that may violate the Act may offer to cooperate with the Bureau and request immunity. Employees may approach the Bureau on their own behalf and the Bureau will evaluate each offer of cooperation separately.[21]

12) Measures to Ensure the Integrity and Security of the Records

In situations where a search takes longer than a day to complete, the Bureau will seal the selected records and leave them on the premises in a secure, locked container. Corporate representatives and counsel are advised that the unauthorized removal or destruction of records may result in the laying of criminal charges under sections 64 and 65 of the Act.[22]

The Commissioner, however, may need to take alternative or additional steps to ensure the integrity and security of the records on the premises. These steps can include the temporary removal of records at the end of each day or leaving a guard on the premises overnight.[23] Such measures typically occur where searches take longer than a day to complete and when it is deemed that there is a risk of records being destroyed, removed or altered if left unattended overnight.

13) Seizure

The final selection of records to be seized is usually undertaken by the team leader following the examination and review of preselected records.[24] In the case of electronic records, it is the electronic evidence officer who will make the final selection. The team leader or electronic evidence officer will make the decision to seize those records that meet or come within

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[21] For more information on the Bureau's Immunity Program please refer to the *Immunity Program under the Competition Act* (Ottawa, Industry Canada, 2007), the *Adjustments to the Immunity Program* (Ottawa, Industry Canada, 2007) and the *Responses to Frequently Asked Questions* (Ottawa, Industry Canada, 2007) found on the Bureau's website at www.competitionbureau.gc.ca .

[22] Sections 64 and 65 are discussed under the heading "Failure to Comply with a Section 15 Search Warrant".

[23] The guard does not have the authority to search during the time period he/she is overseeing the records.

[24] See the section entitled "Selection and Examination of Records".

the ambit of the search warrant and which may be legally taken from the premises. In most cases, prior to removing the records from the premises, the records will be coded with an alpha-numeric code. The actual seizure of records will be conducted by either the team leader or another search team member and an electronic evidence officer named in the warrant.

14) Making Copies of Records

In some cases, search targets or their counsel will make a request that copies be made of the records being seized. Each request will be assessed individually, on a case-by-case basis, taking into consideration a variety of factors, such as the availability of adequate copying facilities, the volume of records and the time it would take to make the copies. Requests for the copying of essential working records are normally granted. If the copying of records does occur, the Commissioner will ensure that continuity of possession is maintained and the integrity of the records are protected throughout. Undertakings may be provided to the target to make copies at the Bureau of the seized records, in which case a fee will be levied per copy.[25]

15) Additional Search Warrants

During the course of a search, it may be necessary to obtain additional search warrants. This may occur in a variety of circumstances. For example, it may be determined that the records sought are located at another premises.

16) Plain View

If during the execution of a search warrant, Bureau staff come across records indicating evidence of a new violation of the law, i.e. one that is different than that outlined in the search warrant being executed, Bureau staff may seize the records not described in the search warrant if they are in plain view, or if there is reason to believe the records might be destroyed during the time it would take to obtain a new search warrant.[26] This power is circumscribed. The record must be in plain view while the Bureau staff member is in a place where he/she is entitled by the search warrant to be; the record must be discovered inadvertently, without knowing in advance of its location, and without having the intention to seize it.

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[25] Please refer to the Bureau publication *Fee and Service Standards Handbook* (Ottawa, Industry Canada, 2003) found on the Bureau's website at www.competitionbureau.gc.ca

[26] See subsections 15(7) and (8) dealing with warrantless searches.

H. Failure to Comply with a Section 15 Search Warrant

1) Refused Entry

Where the Commissioner has reasonable grounds to believe that access to a premises may be denied, or where access to a premises has been denied or otherwise obstructed, the Commissioner will request that the search warrant authorize the Bureau to be accompanied by a peace officer for the purpose of taking such steps that would be considered necessary to gain access to the premises.

2) Impeding an Inquiry, Refusing Access and Destruction of Records

Any attempt to impede and/or prevent the execution of a search warrant, and any attempt to remove or destroy records subject to a search warrant will be taken very seriously by the Commissioner. Pursuant to section 64 of the Act, it is an offence to impede or prevent or to attempt to impede or prevent any inquiry or examination under the Act. Subsection 65(1) of the Act provides that where a search warrant has been issued under the Act, it is an offence to refuse to allow the Commissioner or Bureau staff named in the warrant, to enter and search the premises, including any computer system found on the premises. A person convicted under either of these provisions is liable to a maximum fine of $5,000 or two years in prison or both.

Under subsection 65(3), every person who destroys or alters (or causes to be destroyed or altered) a document or other thing covered by a search warrant is guilty of an offence and may be liable to a penalty of up to five years in prison and a $50,000 fine or both.

Where a corporation commits an offence under section 65, any officer, director or agent of the corporation who directed, authorized, assented to, acquiesced in or participated in the commission of the offence is a party to and guilty of the offence and is liable to the punishment provided for the offence whether or not the corporation has been prosecuted or convicted.[27] In addition, where circumstances warrant, the obstruction of justice provision found in the *Criminal Code* (section 139) may also be used.

[27] See subsection 65(4).

I. Records Obtained Under a Section 15 Search Warrant

1) Confidentiality

Subsection 10(3) of the Act directs that all inquiries be conducted in private. Consistent with that requirement, the Bureau will normally comment publicly on the existence of an inquiry or examination only if it has become public through another source, through the filing of charges, through an application to the Competition Tribunal or the courts, or, in the case of a merger, if the merger has been made public.

Section 29 of the Act provides confidentiality protection for information in the possession of the Commissioner, including information obtained pursuant to a search warrant. More specifically, paragraph 29(1)(*b*) indicates that no person who performs or who has performed duties pursuant to the enforcement and administration of the Act shall communicate any information obtained pursuant to sections 15 and 16 to any other person except to a Canadian law enforcement agency or for the purposes of the administration or enforcement of the Act. Section 29 does not apply, however, when information has already been made public or when the person providing the information authorizes its communication.[28]

2) Report to a Judge, Retention and Detention of Records

Following a search, pursuant to section 17 of the Act, the Commissioner, as soon as practicable, can choose to either bring any record or other thing seized before a judge, or make a report on the records to the judge who issued the search warrant.[29] Typically, the Commissioner will choose to make a report to the judge. Pursuant to subsection 17(3) of the Act, if the judge is satisfied that the records are required for the inquiry or any proceedings under the Act, he/she may authorize the Commissioner to retain them. Subsection 18(4) of the Act further provides that the records that are retained by the Commissioner must be returned to the person from whom they were seized no later than 60 days after the date of the retention order, unless the judge is satisfied on application that further detention of the records, for a specified period of time, is warranted[30]. For example, when a record cannot be copied or the record has other properties with evidentiary value, the Commissioner may wish to keep the original seized record.

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[28] For further information regarding the Bureau's policy on confidentiality, please refer to the Bureau's publication *The Communication of Confidential Information under the Competition Act* (Ottawa, Industry Canada, 2007) found on the Bureau's website at www.competitionbureau.gc.ca

[29] Or one from the same court.

[30] Subsection 18(4) sets out conditions under which the record can be detained for a longer period.

3) Copies, Return, Care and Access of Records

Generally, true copies of the seized records will be made[31] by the Bureau and the originals, which will be coded, will be returned to the person from whom they were seized. Subsection 20(2) of the Act allows for a true copy of a record to be admissible as evidence in any proceeding under the Act and has the same probative force as the original. Section 18 provides that the Commissioner will take reasonable care to ensure that the records that are seized are preserved until they are returned to the person from whom they were seized or until they are required to be produced in a proceeding under the Act. Pursuant to subsection 18(2), the person from whom the records are seized is entitled, at any reasonable time and subject to such reasonable conditions as may be imposed by the Commissioner, to inspect the records.

The true copies that are made of the seized records are records under the control of the Bureau. As such, these records are "government records" within the meaning of the *Library and Archives of Canada Act*. As a result, the records must be maintained by the Bureau and are subject to disposition only under the authority of the Librarian and Archivist.[32]

J. Conclusion

The Commissioner is committed to the effective use of sections 15 and 16. Search warrants are a crucial investigative tool which allow the Commissioner to obtain the information necessary to make a fully informed decision as to the appropriate disposition of a matter. A strong and reasoned approach to the use of section 15 and 16 search warrants is important to the integrity and control of the information gathering process in the effective administration and enforcement of the Act.

Many of the Competition Bureau's publications are accessible on the Internet. The Bureau's Website address is listed below. You can also contact the Bureau through the Information Centre at the address and telephone numbers below to obtain general information, make a complaint under the provisions of the Acts, or request a binding written opinion.

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[31] Subsection 18(3) allows for the Commissioner to make copies of the records seized.

[32] Section 12(1) of the *Library and Archives Act*, S.C. 2004, C11 states that "(n)o government or ministerial record, whether or not it is surplus property of a government institution, shall be disposed of, including by being destroyed, without the written consent of the Librarian or Archivist or of a person to whom the Librarian and Archivist has, in writing, delegated the power to give such consents".

Information Centre
Competition Bureau
Industry Canada
50 Victoria Street
Gatineau, Québec
K1A OC9

Telephone:
National Capital Region: (819) 997-4282
Long distance (toll free): 1-800-348-5358
TDD service: 1-800-642-3844
E-mail address: compbureau@cb-bc.gc.ca
Facsimile: (819) 997-0324
Website: www.competitionbureau.gc.ca

Appendix A

Section 15

15 (1) If, on the ex parte application of the Commissioner or his or her authorized representative, a judge of a superior or county court is satisfied by information on oath or solemn affirmation

(a) that there are reasonable grounds to believe that

(I) a person has contravened an order made pursuant to section 32, 33 or 34, or Part VII.1 or VIII,

(ii) grounds exist for the making of an order under Part VII.1 or VIII, or

(iii) an offence under Part VI or VII has been or is about to be committed, and

(b) that there are reasonable grounds to believe that there is, on any premises, any record or other thing that will afford evidence with respect to the circumstances referred to in subparagraph (a)(I), (ii) or (iii), as the case may be,

the judge may issue a warrant under his hand authorizing the Commissioner or any other person named in the warrant to

(c) enter the premises, subject to such conditions as may be specified in the warrant, and

(d) search the premises for any such record or other thing and copy it or seize it for examination or copying.

(2) A warrant issued under this section shall identify the matter in respect of which it is issued, the premises to be searched and the record or other thing, or the class of records or other things, to be searched for.

(3) A warrant issued under this section shall be executed between six o'clock in the forenoon and nine o'clock in the afternoon, unless the judge issuing it, by the warrant, authorizes execution of it at another time.

(4) A warrant issued under this section may be executed anywhere in Canada.

(5) Every person who is in possession or control of any premises or record or other thing in respect of which a warrant is issued under subsection (1) shall, on presentation of the warrant, permit the Commissioner or other person named in the warrant to enter the premises, search the premises and examine the record or other thing and to copy it or seize it.

(6) Where the Commissioner or any other person, in executing a warrant issued under subsection (1), is refused access to any premises, record or other thing or where the Commissioner believes on reasonable grounds that access will be refused, the judge who issued the warrant or a judge of the same court, on the ex parte application of the Commissioner, may by order direct a peace

officer to take such steps as the judge considers necessary to give the Commissioner or other person access.
(7) The Commissioner or the authorized representative of the Commissioner may exercise any of the powers set out in paragraph (1)(c) or (d) without a warrant if the conditions set out in paragraphs (1)(a) and (b) exist but by reason of exigent circumstances it would not be practical to obtain the warrant.
(8) For the purposes of subsection (7), exigent circumstances include circumstances in which the delay necessary to obtain a warrant under subsection (1) would result in the loss or destruction of evidence.

6. R.S., 1985, c. C-34, s. 15; R.S., 1985, c. 19 (2nd Supp.), s. 24; 1999, c. 2, ss. 8, 37; 2002, c. 8, s. 128.

Section 16

16. (1) A person who is authorized pursuant to subsection 15(1) to search premises for a record may use or cause to be used any computer system on the premises to search any data contained in or available to the computer system, may reproduce the record or cause it to be reproduced from the data in the form of a printout or other intelligible output and may seize the printout or other output for examination or copying.

(2) Every person who is in possession or control of any premises in respect of which a warrant is issued under subsection 15(1) shall, on presentation of the warrant, permit any person named in the warrant to use or cause to be used any computer system or part thereof on the premises to search any data contained in or available to the computer system for data from which a record that person is authorized to search for may be produced, to obtain a physical copy thereof and to seize it.

(3) A judge who issued a warrant under subsection 15(1) or a judge of the same court may, on application by the Commissioner or any person who is in possession or control of a computer system or a part thereof on any premises in respect of which the warrant was issued, make an order

(a) specifying the individuals who may operate the computer system and fixing the times when they may do so; and

(b) setting out any other terms and conditions on which the computer system may be operated.

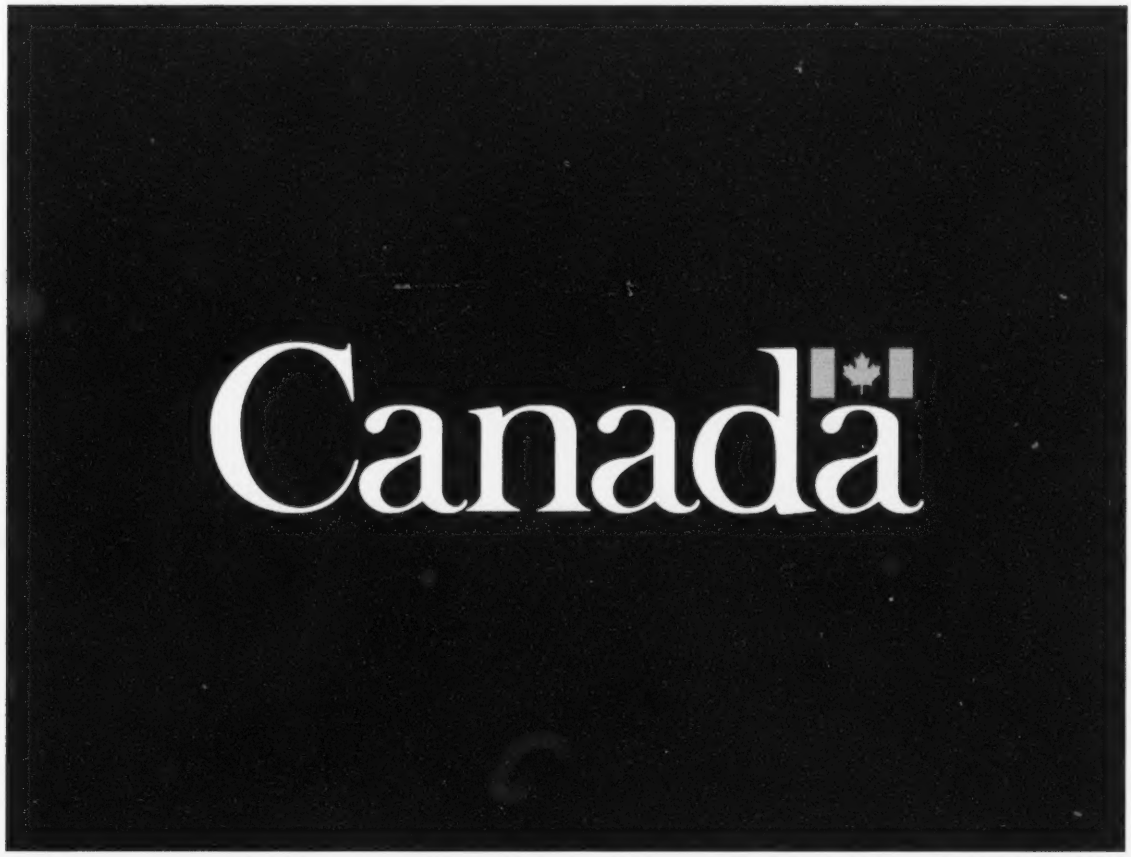
(4) No order may be made under subsection (3) on application by a person who is in possession

or control of a computer system or part thereof unless that person has given the Commissioner twenty-four hours notice of the hearing of the application or such shorter notice as the judge considers reasonable.

(5) No order may be made under subsection (3) on application by the Commissioner after a search has begun of the premises in respect of which the order is sought unless the Commissioner has given the person who is in possession or control of the premises twenty-four hours notice of the hearing of the application or such shorter notice as the judge considers reasonable.

(6) In this section, "computer system" and "data" have the meanings set out in subsection 342.1(2) of the Criminal Code.

R.S., 1985, c. C-34, s. 16; R.S., 1985, c. 19 (2nd Supp.), s. 24; 1999, c. 2, s. 37.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